

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HOANG LY,

Defendant and Appellant.

E047644

(Super.Ct.No. FSB701324)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster,
Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and
Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Hoang Ly appeals from judgment entered following jury convictions
for molesting his stepdaughter, C.C., beginning in 1999, when she was 14 or 15 years old

(Pen. Code, §§ 288, subd. (c)(1), 289, subd. (a)(1)¹; counts 6-8, and 11), and for also molesting C.C.'s younger sister, E.Y., beginning in 2000, when she was nine years old (§§ 288, subd. (b)(1); 288a, subd. (c)(2); 289, subd. (a)(1); counts 1-5, 9-10, and 12). A jury convicted defendant of all 12 counts. The jury also found true the multiple victim enhancements as to each count. (§ 667.61, subds. (a) & (d).) The court sentenced defendant to a determinate term of 12 years, followed by an indeterminate term of 105 years to life.

Defendant contends there was insufficient evidence that he used force or duress when he committed oral copulation against E.Y. (counts 9 & 10; § 288a, subd. (c)(2)).² He also argues that he was denied due process of law because he was convicted of offenses that were medically impossible for him to commit due to his physical disabilities. We concluded there was sufficient evidence to support defendant's convictions. There was also sufficient evidence refuting medical impossibility. The judgment is affirmed.

1. Facts

As of the time of trial in December 2008, defendant had been C.C. and E.Y.'s mother's boyfriend for about 17 years. Defendant lived with C.C. and E.Y. and their mother (mother) for nine years, from about 1992. After moving out, defendant lived in

¹ Unless otherwise noted, all statutory references are to the Penal Code.

² For purposes of brevity, we refer to section 288a, subdivision (c)(2) in this opinion as section "288a(c)(2)."

an apartment within the same apartment complex as mother's apartment. Defendant and mother continued seeing each other.

Offenses Against C.C.

C.C. testified at trial that, while living with C.C.'s family, defendant would come into her room while she was doing her homework, sit close to her, press up against her, touch her on the sides of her body, and ask her questions, such as what her goals were and whether she had a boyfriend. Because this made her uncomfortable, C.C. started locking her bedroom door.

When C.C. was 14 or 15 years old, around 1999, defendant picked up C.C. from high school and took her to his apartment. C.C. testified that at the apartment, when she was 14 years old, defendant sat next to her and rubbed her arms and legs. He then laid her down, grabbed her arms, and pinned her arms above her head. She could not remember if he was on top of her or to the side. After he pinned her down, he told her to stop crying and not to tell anyone. While she cried, he continued to yell at her and started feeling her breasts. C.C. cried and screamed.

Defendant then unbuttoned and pulled down her pants. He put his fingers in her vagina. He pulled his pants down with his left arm, while holding C.C.'s arms with his right arm, and put his penis in C.C.'s vagina. This was very painful. C.C. cried and screamed for defendant to stop. C.C. unsuccessfully attempted to fight off defendant by kicking. At the time, she weighed about 89 to 95 pounds, and was 5'1". She did not believe she could leave because he was very strong.

This happened the same way three or four times when C.C. was about 14 years old, and each time, after defendant finished having sex with C.C., he told her not to tell anyone. C.C. acknowledged that she told an officer that this happened about once a week for a year. C.C. clarified that she was at defendant's apartment three or four times a week, and he did this to her about once a week when she was there. It stopped when she was 15.

On one occasion when C.C. was 15 years old, defendant was angry at C.C. when he picked her up from school because she was late. He drove her to a shack on a farm. Inside the shack, he pulled out a dagger, yelled at her for having a boyfriend, and told her she should not associate with the type of friends she had. Defendant threatened to kill her if she disobeyed him or had a boyfriend. Defendant then drove C.C. home. This happened a couple more times. One time, on her 16th birthday, he tied her up in the shack and yelled at her that, if she were his own daughter, he would have already killed her. C.C. told mother about defendant taking her to the shed but mother did not believe her.

C.C. testified that when she was 17 years old, she yelled at defendant because he was yelling at kids in front of her house. Defendant pinned her against the door and put his arms around her neck. C.C. screamed. Mother saw defendant do this but did not do anything to stop defendant from choking C.C. Mother just told C.C. to stop yelling at defendant.

The next day, C.C. told the school counselor about the incident. The counselor called the police, who interviewed C.C. Right after that, the court issued a restraining

order against defendant. C.C. told the police defendant choked her. She also told Detective Bragg that defendant tried to kill her and that defendant had come into her room, holding an ax in his left hand over C.C.'s head, and yelled at her. On another occasion, defendant drove C.C. to a garden or vegetable field, held a dagger in his right hand and yelled at her that if she ever disobeyed him or had a boyfriend, he would kill her. C.C. feared defendant was going to stab her.

Offenses Against E.Y.

E.Y. testified that in 2000, after defendant moved out of her home, mother sent E.Y. to defendant's apartment to visit him. Defendant started molesting her at his apartment when E.Y. was nine years old. Defendant would take her into his room, put her on his bed, and hold her down with one of his arms. E.Y. did not remember which arm he used. Sometimes defendant held down her arms at her side and sometimes he held them above her head.

While holding E.Y. down, defendant took off her pants and underwear or told her to do it. Defendant got on top of her and put his penis or fingers in her vagina. A couple of times he put his penis in her, which hurt. E.Y. sometimes told defendant to stop but he ignored her. He usually ejaculated on E.Y.'s stomach or below her waistline. A few times defendant put his mouth on E.Y.'s "vagina."³

³ E.Y. used the word "vagina" but she probably meant "genitals." Although the word "vagina" is used in the testimony, the vagina is an internal organ, defined as "a canal that leads from the uterus of a female mammal to the external orifice of the genital canal." (Webster's 3d New Internat. Dict. (1993) p. 2528.)

E.Y. was afraid to leave when defendant was molesting her. Defendant told her to be a good girl and not tell anyone. He also almost always gave her money after molesting her. Defendant molested her more than once a year, beginning when she was nine, until she was 14 years old.

In February 2007, C.C. called the police and reported that she was concerned defendant was molesting her younger sister, E.Y., as he had done to C.C. when she was younger. C.C. told Officer Retamoza that, for the first time, E.Y. told her that evening that defendant had been molesting her.

Officer Jarvis, who was assisting Retamoza, spoke to E.Y. that night. She was inebriated. She said she had been drinking to forget “the dirty things she had to do when she was younger.” She told Jarvis she was reluctant to talk about it because she did not want it to cause her mother to separate from her stepfather. E.Y. told Officer Jarvis that when she was nine years old, defendant began molesting her when her mother sent her to his apartment to visit him. Defendant put his fingers in her vagina and “kissed” her “vagina.”

C.C. and E.Y. testified that their mother told them to drop the case against defendant. Their mother also told E.Y. in August 2007, to write a letter requesting the charges to be dropped. E.Y. wrote the letter because she did not want the matter to have such a big impact and she knew it was not going to make her or anyone else happy.

Defendant’s Testimony

Defendant testified that in 1973, he injured his arms during the Vietnam War. Defendant denied sexually assaulting C.C. and E.Y. He claimed he was never alone with

C.C. in his apartment. He denied wrestling with C.C., although he explained to her how to do kung fu moves. He denied that he was capable of pinning down C.C.'s arms to her side or above her head with his right arm and unbutton or unzip her pants with his left arm. Defendant also denied physically disciplining C.C. and E.Y. He claimed C.C. and E.Y. were angry at him for allowing their mother to beat them. Twice, mother asked him to discipline C.C. On those two occasions, he drove C.C. to a vegetable farm, told C.C. to behave or he would tie her up and leave her there, and then brought her home after she agreed to change.

Defendant further testified that in 2000, he moved into an apartment and was living alone. He cooked for himself. He was able to lift pots and pans, wash his dishes, take a shower, wash his hair, grocery shop, carry his groceries, and drive.

Mother's Testimony

Mother testified C.C. and E.Y. never told her defendant was molesting them. C.C. told her that defendant once tied her up and told C.C. to do better in school or he would kill her. Mother did not ask him to do that. Mother also saw defendant try to choke C.C. Mother yelled and defendant stopped. Defendant was upset at C.C. because she cursed at him when he told her not to have a boyfriend. Mother also saw defendant hold an ax above C.C.'s head while yelling at her to turn off her bedroom light late at night. Mother took the ax away.

2. Sufficiency of the Evidence of Force and Duress

Defendant contends there was insufficient evidence of force to support his convictions for committing forcible oral copulation against E.Y. (counts 9 & 10; § 288a(c)(2).)

A. Standard of Review

When a defendant contends that the evidence is insufficient to support a conviction, the test on appeal is whether there is substantial evidence, i.e., evidence that is reasonable, credible, and of solid value, to support the conclusion of the trier of fact that the defendant is guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319-320, *People v. Johnson* (1980) 26 Cal.3d 557, 576 (*Johnson*).) In making this determination, we view all evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*Johnson* at p. 576.)

B. Force

The People argued at trial that defendant committed forcible oral copulation against E.Y. by means of force, fear or duress.

Under section 288a(c)(2), “the gravamen of the crime of forcible oral copulation is a sexual act accomplished against the victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury.” (*People v. Guido* (2005) 125 Cal.App.4th 566, 576.) Forcible oral copulation under section 288a(c)(2) “is proven when a jury finds beyond a reasonable doubt that defendant accomplished an act of oral

copulation by the use of force sufficient to overcome the victim's will.” (*Guido* at p. 576.)

For purposes of section 288a(c), force means physical force substantially different from or substantially greater than that necessary to accomplish the oral copulation itself. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 470, 474-475, 485-486 [affirming subdivision (b) convictions of a defendant who picked up the child victims and moved his hands between their legs and on their crotches as he carried them along].) The element of force above and beyond that required to accomplish the act itself is established if the defendant grabs or holds a victim who is trying to pull away. (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 44-45, 48 [finding force when the defendant grabbed the victim's hand, placed it on the defendant's genitals, and rubbed himself with it and then made the victim orally copulate him while he pushed the victim's head].)

Defendant argues that there was insufficient evidence that he used force to commit oral copulation against E.Y. We disagree. There was ample evidence defendant used force beyond that needed to commit oral copulation. E.Y. testified that, when defendant molested her, he pinned her arms over her head or to her side, while removing her pants and underwear, and got on top of her. She told him to stop but he continued. Even when there was the opportunity to flee, she did not because she was afraid of defendant. The jury could reasonably find, based on these circumstances, that defendant used force substantially greater than that necessary to orally copulate E.Y. (*People v. Cicero, supra*, 157 Cal.App.3d at pp. 474-475.)

Defendant relies on *People v. Kusumoto* (1985) 169 Cal.App.3d 487 (Kusumoto) to support his position that the facts of this case do not support convictions for forcible oral copulation (§ 288a(c)(2)). In *Kusumoto*, the victim was asleep when the defendant put his hand into her shorts and placed his finger into her vagina. A jury convicted the defendant of rape by foreign object, which required in part that the act be “‘accomplished against the victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury’” (*Kusumoto, supra*, 169 Cal.App.3d at p. 490, italics omitted, quoting § 289, subd. (a)(1).) Applying the statutory language, the court concluded that, although the defendant unquestionably perpetrated an act to which the victim did not consent, the requirement of “force” was not met because the victim was asleep, and the force used by the defendant was only that necessary to accomplish the act itself. (*Id.* at p. 494.)

Kusumoto, supra, 169 Cal.App.3d 487 is factually distinguishable from this case since in *Kusumoto*, the victim was asleep, and thus there was no basis for a reasonable jury to conclude that the defendant overcame her will. By contrast, in this case E.Y. was awake when defendant molested her. She testified that sometimes she even told defendant to stop but he ignored her. Furthermore, defendant’s acts of pinning down E.Y.’s arms and getting on top of her, involved a greater degree of force than that used in *Kusumoto*.

We conclude substantial evidence in the record supports the jury’s finding that defendant’s conduct involved force substantially different than that necessary to commit oral copulation and thus was sufficient to support his convictions for oral copulation.

C. Duress

There was also evidence that defendant used duress, as well as coercion and fear, to commit oral copulation against E.Y. Defendant argues that at trial the prosecution did not rely on duress, but the record indicates otherwise. During closing argument, the prosecutor argued defendant committed oral copulation using “force or fear or duress” and the trial court instructed the jury on such alternative elements.

For purposes of section 288a(c), “duress” means “a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.’ [Citations.]” (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13 (*Cochran*)). “‘The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress.’ [Citation.]” (*Id.* at pp. 13-14, quoting *People v. Pitmon, supra*, 170 Cal.App.3d at p. 51.) “Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family.” (*Cochran* at p. 14, citing *People v. Senior* (1992) 3 Cal.App.4th 765, 775 (*Senior*) and *People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.)

As the court recognized in *People v. Schulz, supra*, 2 Cal.App.4th at page 1005, “duress involves psychological coercion. [Citation.] Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] ‘Where the defendant is a family member and the

victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress. [Citation.]”

Here, there was sufficient evidence of duress. When defendant first began molesting her, E.Y. was nine years old and defendant was 64 years old. The molestation continued for five years. Defendant held a position of authority and dominance over E.Y. as her stepfather and afterschool caretaker. Defendant molested E.Y. while at his home, when no one else was present. Defendant told her not to tell anyone and gave her money. As a consequence, when defendant molested E.Y., she was a young, isolated, vulnerable child, susceptible to parental and physical authority. She testified that even though there were times when she could have left when defendant was molesting her, she did not because she was scared of defendant. While there was no direct evidence defendant threatened E.Y., there was evidence of an implied threat that defendant would harm her. The totality of the evidence was sufficient to establish that defendant used duress, fear, intimidation, and psychological force to commit oral copulation.

In *Cochran*, the court found there was sufficient evidence of duress, stating: “The victim was only nine years old. Cochran is her father with whom she resided. She was 4 feet 3 inches tall. He was 5 feet 9 inches tall and outweighed her by about 100 pounds. The sexual acts occurred in the family home she shared with Cochran and her mother. Throughout the videotape [shown to the jury], Cochran directs and coaches the victim what to do. It is clear the daughter is reluctant to engage in the activities and, at most, acquiesces in the conduct. The victim engages in the conduct only because she is directed to do so and stops as soon as Cochran stops directing her to do a particular act.

During a segment where she is orally copulating Cochran, she repeatedly gags, curls up on the sofa away from Cochran, and only continues reluctantly and as a matter of compliance with parental authority. During other parts of the videotape, she complains Cochran is hurting her. Cochran responds he is not hurting her, that he is not yet finished, or sometimes alters his activity.” (*Cochran, supra*, 103 Cal.App.4th at p. 15.)

While in the instant case, the defendant was E.Y.’s stepfather, rather than her biological father, this has minimal, if any, significance. Defendant was the only father E.Y. knew and held the role of her father throughout her life, for as long as she could remember. Also, although unlike in *Cochran*, there was no testimony that defendant told E.Y. that if she reported the abuse, it would end her mother’s relationship with defendant, it can reasonably be inferred that E.Y. was well aware of this when defendant told her not to report the molestation. E.Y. testified that in 2007, when E.Y. was 15 and a half, she was reluctant to talk about defendant molesting her because she did not want it to cause her mother to separate from her stepfather. As in *Cochran*, defendant held a parental role, began molesting E.Y. when she was nine years old, and persisted in molesting her despite her clear opposition.

As noted in *Senior, supra*, 3 Cal.App.4th at page 775, “[p]hysical control can create ‘duress’ without constituting ‘force.’” Here, there was substantial evidence defendant physically controlled E.Y. while molesting her. Also, as the *Senior* court notes, “‘Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of

the victim' is relevant to the existence of duress. [Citation.]” (*Id.* at p. 775.) Such circumstances existing in the instant case support a finding of duress.

We conclude there was more than sufficient evidence of force and duress to support defendant's convictions for forcible oral copulation against E.Y.

3. Defendant's Disabilities

Defendant asserts that he was denied due process of law because the jury relied on evidence of acts attributable to defendant that were medically impossible for him to commit. Defendant claims that, because of his permanent arm and hand injuries, it was medically impossible for him to pin down E.Y.'s arms with one hand, while simultaneously unbuttoning or unzipping her pants, pulling down her pants and underwear, and orally copulating E.Y. Defendant argues that his left hand was useless because it was paralyzed and he could not bend his right arm at the elbow.

A. Evidence of Defendant's Disabilities

E.Y. testified that when she went to defendant's apartment, defendant had arm disabilities but he was able to use his arms and hands. He was able to drive her to and from school, eat, smoke cigarettes, and lift and carry five-pound gallons of water upstairs. He also showed her ways to defend herself, including “takedowns” and wrestling moves. While defendant and E.Y. were standing, defendant would flip E.Y.

C.C. testified that she was aware defendant was disabled. Defendant nevertheless was able to drive, make coffee, smoke cigarettes, turn on the TV, and live by himself. He could use his arms to do all of the daily things people need to do. He could not hold tweezers to pluck his mustache and beard. Defendant was able to pin both of her hands

down with his right arm and, with his left arm, he pulled her pants own and his own pants down.

Dr. Ngo testified that he saw defendant once a month for his injuries, from January 1991 to June 2007. Dr. Ngo prescribed pain medication for defendant for his injuries. Defendant had deformities and wounds from the Vietnam war. His left hand was crooked and he could not extend his arm because of an elbow wound. His right arm was stiff and deformed. His left arm was also stiff but he had learned to use it. He could hold a fork in his left hand but not in his right hand. His right hand was useless. He had to use his left hand. He also had war-related injuries to both legs, causing him to wobble when he walked.

According to Dr. Ngo, defendant could not pin down a victim's arms with his right hand and sexually penetrate her with his left hand. Dr. Ngo believed defendant's condition had plateaued and would not get much better. Dr. Ngo did not test defendant's arm strength or test for tendon or nerve damage. Dr. Ngo based his opinions on what defendant told him and on Dr. Ngo's observations of defendant's range of movement of his arms.

Defendant testified that in 1973, he was wounded in both arms and hands. He was shot in the left arm. His injuries have gotten worse. He said he could not pick up the coffee pot with his left hand because his hand was too weak. He also could not clench his left hand but could hold a tissue in it. Defendant stated that he could not use his left hand and arm for any purpose whatsoever. He could only use his left arm for things that were light. For instance, he could hold a pen in his left hand.

Defendant said he could not do anything with his right arm because the tendons were cut. He could, however, carry with his right arm and drive but could not flex his right arm. Defendant claimed he has limited use of his right hand and cannot bend his right arm at the elbow.

B. Discussion

While there was testimony that defendant's use of his hands and arms is limited, there was also evidence establishing that he was able to use his hands and arms in various ways, including committing forcible oral copulation. Furthermore, defendant's doctor's testimony did not conclusively and irrefutably establish that defendant was unable to commit the charged offenses. Dr. Ngo did not conduct any strength or nerve tests and his testimony concerning defendant's ability to use his hands was inconsistent with defendant's, as well as C.C. and E.Y.'s, testimony. Furthermore, as instructed, the jury was not required to accept Dr. Ngo's opinions as true and correct. (CALCRIM No. 332.)

The victims' testimony established that, despite defendant's arm and hand disabilities, he was able to hold the girls down and molest them. There was also evidence that defendant was capable of doing numerous activities requiring the use of his hands and arms. The evidence indicates that, while defendant may not have been able to use his left hand much, he had sufficient strength in his left arm, which he could have used to pin down the victims' arms while using his right hand to commit the various acts requiring grabbing, holding, and fine motor skills. There was also evidence that defendant was actually able to use his left hand to some degree.

Defendant's ability to commit the charged offenses, despite his physical limitations, was an issue for the trier of fact to determine. Defendant did not establish as a matter of law that it was medically impossible for defendant to commit the charged offenses. Since we must view all evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence (*Johnson, supra*, 26 Cal.3d at p. 576), we conclude there was sufficient evidence upon which a rational fact finder could have found that defendant was capable of, and did, commit the charged offenses.

4. Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Hollenhorst
Acting P.J.

We concur:

s/McKinster
J.

s/Miller
J.